

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MAXIMILIAN M.

Petitioner,

vs.

SAN ANDREAS REGIONAL CENTER,

Respondent.

OAH No. N 2006060971

(Early Intervention Services Act
Gov. Code, § 95000 et seq.)

DECISION

Administrative Law Judge Cheryl Tompkin, State of California, Office of Administrative Hearings, heard this matter on July 7, 2006, in Campbell, California.

Petitioner Maximilian M. was represented by his mother Ana M. and father Jose M.

Jacques Maitre, Director's Designee for Fair Hearings, represented the service agency, San Andreas Regional Center (SARC).

The case was submitted for decision on July 7, 2006.

ISSUES

(1) Whether SARC must pay a rate sufficient to attract infant educators even though the cost will exceed the maximum State rate normally paid by SARC.

(2) Whether SARC must develop new or expand existing infant education resources in order to enable petitioner to receive required infant education services even though there is currently a freeze on all start-up funding for such services.

FACTUAL FINDINGS

1. Petitioner was born on November 3, 2003. He was assessed and found eligible for regional center services under the Early Start Program (ESP) due to developmental delays.

2. An IFSP¹ was developed on April 25, 2006. Among other things, the IFSP specified that petitioner was to receive specialized individual instruction from an Early Start teacher (infant educator) or a speech language pathologist once or twice a week for one hour in the home. Although it is not specified in the IFSP, petitioner's parents wish the instruction to be delivered in Spanish or through a Spanish interpreter since Spanish is the primary language spoken in the home. The projected start date was May 25, 2006, continuing through November 3, 2006, petitioner's third birthday. SARC was responsible for funding the instruction.

3. Petitioner has not yet received instruction from an infant educator or a speech pathologist. His parents are concerned because he will be three years old, and become ineligible for early intervention services, in four months, when he turns three years old. They were told that petitioner was scheduled to begin receiving services on May 25, 2006, but that if no interventionist was provided after one month they could request a hearing. At one point petitioner's parents were told that an interventionist was available to provide instruction to petitioner but that no interpreter was available. They have not been provided with any additional information since this communication nor have they been provided with an interventionist or interpreter. Therefore, they have filed the subject fair hearing request.

4. Recently SARC has experienced an influx of early start eligible children well in excess of its expectations. At the same time, SARC has experienced a general shortage of infant education specialists in its catchment area. SARC is currently experiencing a crisis in staffing for early intervention services.

5. SARC funds infant education services at the State rate, which was established over five years ago and has not been adjusted to meet inflation. SARC's infant education vendors have advised SARC that they are struggling financially. Many are losing money by supplying services at the State rate. At least one provider is currently using personal resources to cover business costs. SARC vendors have indicated that they are unwilling to consider expansion unless they are paid a higher rate. As a result, SARC has not been able to

¹ Under California's Early Start program a regional center must conduct a planning process that results in an individualized family service plan (IFSP) once it is determined that a child is eligible for early intervention services. The IFSP must specify the early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services. (Cal. Code Regs., tit. 17, §52109, subd. (b); see also 20 U.S.C., § 1436, subd. (d)(6).)

find a qualified vendor to provide individualized infant education services to petitioner at the State rate.

6. SARC has also experienced difficulty in obtaining professionals qualified to deliver services in Spanish. The pool of bilingual infant educators is very small and such individuals are in high demand. It is also difficult to locate qualified Spanish interpreters who are willing to work for the rate paid by SARC.

7. SARC acknowledges that it has an obligation to provide infant education services to petitioner in a language accessible to the family, and that it has a continuing obligation to locate and deliver such services. However, it has been SARC's experience that local infant education service providers and Spanish interpreters are increasingly unwilling to work at the State rate. SARC believes it would have a greater chance of securing infant education services for petitioner if the rate were sufficient for prospective vendors to meet their business expenses. SARC also believes that it would be able to secure Spanish interpreters if it were able to pay a higher rate.

In order to increase the number of available infant educators, SARC would need to expand existing and actively develop new infant education resources. However, Jacques Maitre, SARC's Director's Designee for Fair Hearings, testified that there is currently a State freeze on start-up funding. Therefore, SARC does not feel it can provide financial incentives to develop new resources or encourage infant education centers to expand. It is SARC's position that it cannot pay an amount in excess of the State rate or provide financial incentives to expand or develop new resources without permission from the Department of Developmental Services, or an order compelling it to do so.

LEGAL CONCLUSIONS

1. Part C, subchapter III of the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.) (IDEA) authorizes federal funding to assist states in maintaining and implementing a comprehensive statewide system to provide early intervention services for infants and toddlers with disabilities and their families. (20 U.S.C. § 1433.) Under this program each state is given the opportunity to receive federal funds to provide services for eligible children from zero to thirty-six months if certain requirements are met. California has chosen to participate and has passed the necessary legislation. California's program is known as "Early Start," and its statute, the California Early Intervention Services Act, is found at Government Code section 95000 et seq. Regulations have also been adopted and are found at title 17 California Code of Regulations sections 52000 through 52175.

2. The California Legislature has found that early intervention services represent an investment of resources, "in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization." (Gov. Code, § 95005, subd. (a)(2).) The Legislature has also recognized that time is of the essence and that "[t]he earlier intervention is started, the greater the ultimate cost-effectiveness and the higher is the educational attainment

and quality of life achieved by children with disabilities.” (*Id.*) State regulations also stress the need to move quickly. Early intervention services specified in the IFSP are to “begin as soon as possible.” (Cal. Code Regs., tit. 17, § 52109, subd. (b).) Regional centers are required to arrange, provide, or purchase such services “as soon as possible” and an infant or toddler is not to be placed on a waiting list for early intervention services required under the IFSP. (Cal. Code Regs., tit. 17, §52106, subds. (c) & (d).) Regional centers are also the payor of last resort for infants and toddlers determined eligible for regional center services. (Cal. Code Regs., tit. 17, § 52109, subds. (a) & (b).)

3. Government Code section 95004, subdivision (a), provides “Direct services for eligible infants and toddlers and their families shall be provided pursuant to the existing regional center system under the Lanterman Developmental Disabilities Services Act . . . and the existing local education agency system” Under the Lanterman Act a regional center is authorized to purchase services or supports for a consumer pursuant to “vendorization or contract.” (Welf. & Inst. Code, § 4648, subd. (a)(3)(A).) A regional center may reimburse an individual or agency for services or supports provided to a consumer if the individual or agency has completed the vendorization process. (Welf. & Inst. Code, § 4648, subd. (a)(3)(B).) The rate of reimbursement is limited to “a cost not to exceed the maximum rate of payment for that service or support established by the department.” (Welf. & Inst. Code, § 4648, subd. (a)(4).)

Under the Lanterman Act the Department of Developmental Services is responsible for establishing a process of setting rates for services purchased by regional centers. (Welf. & Inst. Code, § 4690.) Accordingly, when purchasing services under the Lanterman Act, regional centers are not permitted to exceed the rate set by the Department of Developmental Services. Pursuant to Government Code section 95004, subdivision (b)(1), Lanterman Act provisions relating to vendorization and ratesetting also apply to the provision of early intervention services, “except where compliance with those provisions would result in any delays in, or any cost to the families for, the provision of early intervention. . . .”²

² Government Code section 95004, subdivision (b)(1) provides in pertinent part:

In providing services under this title, regional centers shall comply with the Lanterman Developmental Disabilities Service Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, and its implementing regulations (Division 2 (commencing with Section 50201) of Title 17 of the California Code of Regulations) including, but not limited to, those provisions relating to vendorization and ratesetting, except where compliance with those provisions would result in any delays in, or any cost to the families for, the provision of early intervention, or otherwise conflict with this title and the regulations implementing this title (Chapter 2 (commencing with Section 52000) of Division 2 of Title 17 of the California Code of Regulations), or Part C of the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1431) et seq., and applicable federal regulations contained in Part 303 (commencing with Section 303.1) of Title 34 of the Code of Federal Regulations.

4. SARC believes that in order to purchase Early Start services at a cost higher than the maximum State rate it has to receive a rate exception from the Department of Developmental Services. SARC is mistaken. The express language of Government Code section 95004, subdivision (b)(1) only requires compliance with the Lanterman Act provisions relating to vendorization and ratesetting if compliance would not result in any delays in or costs to the family for provision of early intervention services. In this case, SARC has been unable to secure needed services because the maximum State rate is so low. This has resulted in a delay in the delivery of services to petitioner, who has not yet received the infant education program to which he is entitled under the IFSP. Under such circumstances, SARC is not required to comply with Lanterman Act provisions relating to vendorization and ratesetting and may pay a rate that is higher than the State maximum in order to secure services required under the IFSP.

5. SARC also believes that it is precluded from expanding existing or developing new infant education resources because there is currently a freeze on start-up funding. However, the State freeze on start-up funding does not limit SARC's ability to develop resources. Although Early Start services are administered through the regional centers created under the Lanterman Act, neither the substantive provisions of the Lanterman Act nor the regulations implementing it govern the Early Start program. Early Start is a federal program, with federal funding, and is governed by federal law as implemented by the California Early Intervention Services Act and its enabling regulations. (See Gov. Code, §§ 95106-95022; Cal. Code Regs., tit. 17, § 52000 et seq.)

The mandate under Early Start is to obtain early intervention services for the disabled child as soon as possible (Cal. Code Regs., tit. 17, §§ 52109, 52106), and no limitations upon the allowable cost of Early Start services are found in federal law. Subchapter III of IDEA, clearly provides that Early Start services are to be provided at no cost and without limitation, unless federal or state law provides for a system of payments by families, including a schedule of sliding fees. (20 U.S.C. § 1432, subd. (4)(B); see also 34 CFR § 303.13, subd (a)(3)(iv).) As previously discussed, the only restriction on funding imposed by State law is found in Government Code section 95004, and that restriction is inapplicable in cases such as this one where complying with vendorization or ratesetting requirements would result in any delay in the provision of early intervention services. Accordingly, SARC must devote whatever resources are necessary for it to secure the services required under petitioner's IFSP as soon as possible.

6. SARC agrees that infant education services for petitioner are both necessary and appropriate. SARC has not been able to find a vendor willing to provide an infant education program for petitioner at the maximum State rate, nor has it been able to develop new infant education resources because of the low State rate and/or a freeze on State start-up funding. However, SARC is not bound by the State freeze with respect to provision of early intervention services. And if the prevailing rate for infant educators were higher than the existing State rate, SARC would likely be able to obtain an infant education program for petitioner, either through expansion of existing resources or development of new resources. SARC is therefore bound to pay a rate sufficient to attract infant educators and/or permit development of new or expansion of existing infant education resources in order to enable petitioner to receive the Early Start services to which he is entitled.

ORDER

1. Petitioner's request that SARC be required to fund infant education services at a rate sufficient to attract infant educators is granted. SARC shall fund the full and actual cost of providing infant education for petitioner without regard to State funding limitations.

2. SARC shall also be required to fund development of new or expansion of existing infant education resources in order to enable petitioner to receive the early intervention services to which he is entitled. SARC shall fund development of new or expansion of existing infant education resources without regard to State funding limitations or the State freeze on start-up funding.

DATED: July 19, 2006

CHERYL TOMPKIN
Administrative Law Judge
Office of Administrative Hearings